

How tenants can take action



How to prevent or address the problem of smoke-penetration in apartments

There are options available to tenants to address the problem of smoke-penetration in apartment blocks. An initial approach to resolve the problem might be to discuss possible solutions directly with the smoker. This may be effective and no further action is required. However, this may only be a short-term strategy. Implementing a by-law in your apartment complex is a longer term solution that protects all residents of an apartment complex.

► Introduce a smoke-free by-law

To manage the shared living environment of all residents and ensure proper use of common property, strata schemes can introduce a set of rules called by-laws. By-laws apply to all residents in a strata scheme. An owners' corporation can introduce by-laws to address smoke-penetration in apartments. The NSW Government *Strata Schemes Management Regulations 2016*¹ includes example by-laws concerning smoke-penetration that can be adopted and used in strata schemes. Cancer Council NSW recommends a 100% smoke-free home. A first step is to check whether your strata scheme already has by-laws concerning smoke-penetration.

► What is the process for introducing a by-law?

The strata scheme can create smoke-free by-laws or make changes to existing ones. New by-laws can be made through a special resolution at a general meeting of the owners' corporation, which requires that 75% vote in favour of the resolution. Landlords are part of the owners' corporation and can advocate and vote for a smoke-free by-law on your behalf. Tenants may vote only if they hold

a proxy (giving them voting rights on an owner's behalf). As a tenant, you also have the right to attend owners' corporation meetings and can speak on particular matters if the owners' corporation votes to allow it.

See Fact sheet 5:

Smoke-free by-laws: know your options.

► The role of a tenant representative

If at least half of the apartments in your strata scheme have been tenanted, then a tenant representative can be nominated as a non-voting member of the executive strata committee. The tenant representative can advocate for a smoke-free by-law on your behalf at the owners' corporation meeting.

► There are other ways to address smoke-penetration through the legal system

Under the current *Strata Schemes Management Act 2015*,² residents cannot cause a nuisance or hazard that can interfere with another person enjoying their apartment or common property. If cigarette smoke penetrates your apartment from other parts of your strata building it can become a nuisance and, as a result, be subject to legal redress. You should also be aware that under the *NSW Residential Tenancies Act 2010*³ your landlord or landlord's agent must take all reasonable steps to ensure that other neighbouring tenants do not interfere with your reasonable peace, comfort or privacy in using your residential premises. In both of these cases the Civil and Administrative Tribunal is empowered to hear and settle disputes relating to residential tenancies.

■ Case Study

An apartment complex in Ashfield passed a 100% smoke-free by-law in their apartment complex

The chairman of an owners' corporation for a residential apartment building in the inner western Sydney suburb of Ashfield was approached by residents concerned about tobacco smoke penetrating their apartments. They were also dismayed at having to continually remove tobacco-related litter from footpaths and garden beds at the block. Residents complained of being exposed to the smoke day and night with little respite. The smoke was originating from two units in the block of eight. In one of the two units the smoke would reportedly drift from the living room through a balcony door and then through balcony doors and windows of other units. Residents believed the smoke was also travelling through vents in the walls of units and via the building roof cavity. In the other of the two units, the tenant reportedly used the balcony for smoking with the resultant smoke drifting directly into windows and other balcony doors.

The chairman sought advice from the block's strata manager about the legality of a strata by-law that would allow a 100% smoke-free policy to be implemented at the block. Based on a 2006 decision by the Consumer, Trader and Tenancy Tribunal in NSW,⁴ the strata manager confirmed the legality of such a by-law. Consequently, at the request of the owners' corporation, the strata manager developed a by-law, which was supported by more than the required 75% of those attending the special meeting organised to decide the matter. Subsequently, all current residents of the building were notified of the new by-law, and from that point on, every new tenant was informed of the by-law prior to signing their lease.

Signage was also posted at strategic points on the property to inform visitors - including trades people - that the entire property is a smoke-free area. Shortly after the by-law was adopted, one tenant from whose unit tobacco smoke had been escaping moved out. The tenant in the other unit from which smoke had been escaping reportedly initially refused to comply with the requirement of the by-law and continued to smoke on the unit balcony. The response of the executive committee was to advise the tenant that if this non-compliance continued the tenant would be issued with a 'Notice to Comply with a By-Law' and that a fine of up to \$550 could be imposed by the Consumer, Trader and Tenancy Tribunal. In response, the tenant agreed to walk the short distance to the footpath at the front of the building and smoke there, thus resolving the matter. The chairman of the owners' corporation has informed Cancer Council NSW that since the by-law was passed:

"... we have received nothing but praise from all the residents of the building, new tenants and owners in the building, and the managing agents of the units. It is definitely a healthier place to live without any unsightly cigarette butts on the ground or foul secondhand smoke wafting throughout the building and common areas. I believe we have increased the rental/resale value of each unit in the building. After all, approximately 83% of the population do not smoke and would preferably live in an apartment block that is free of cigarette smoke as a result of how close we all live to our neighbours, and a non-smoking tenant would definitely want to rent out a unit that has not had a smoker in it previously. However, this is difficult to quantify, but is the opinion of myself and the other seven owners, along with the managing agent of the building."

■ The Civil and Administrative Tribunal

Tenants and owners have the right to apply for a hearing by the Civil and Administrative Tribunal and have the power to take a resident who smokes to the Tribunal seeking that the resident cease all behaviour (including smoking) that is causing a nuisance. It was the Tribunal that ordered residents in an apartment complex to take action to prevent smoke odour from their cigarettes entering other apartments and common property

after a strata committee brought a case on behalf of tenants who had been exposed to secondhand smoke.^{4,5} See the NSW Government Civil and Administrative Tribunal website for information on how to resolve a tenancy dispute.

 www.ncat.nsw.gov.au/Pages/cc/Divisions/Tenancy/tenancy.aspx

REFERENCES

- ¹ New South Wales Government. *Strata Schemes Management Regulation*. 2016 [Accessed 12 September 2016]; Available from: <http://www.legislation.nsw.gov.au/>.
- ² New South Wales Government. *Strata Schemes Management Act*. 2015 [Accessed 12 September 2016]; Available from: <http://www.legislation.nsw.gov.au/#/view/act/2015/50/full>.
- ³ New South Wales Government. *Residential Tenancies Act*. 2010 [Accessed 12 September 2016]; Available from: <http://www.legislation.nsw.gov.au/#/view/act/2010/42>.
- ⁴ Australasian Legal Information Institute. *Owners corporation versus May & Ors*. 2006 [Accessed 12 September 2016]; Available from: http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWCCTT/2006/739.html?stem=0&synonyms=0&query=durie%20and%20smok*.
- ⁵ Australasian Legal Information Institute. *Bhandari v Laming* NSWCATAP 224. 2015 [Accessed 12 September 2016]; Available from: <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWCATAP/2015/224.html?stem=0&synonyms=0&query=laming%20bhandari>.